No. 87-129

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES IN OPPOSITION

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August 21, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the courts below properly enforced a Public Law Board award arising under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which granted penalty pay against a railroad in accordance with a longstanding custom and practice in the railroad industry for willful violation of the collective bargaining agreement.

PARTIES BELOW

Plaintiff/Appellee (Respondent on this Brief in Opposition):

Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employes

Defendant/Appellant:

St. Louis Southwestern Railway Company

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Respondent Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employes ("BRAC")[1] respectfully requests that the petition for writ of certiorari be denied. The opinions below, the basis of this Court's jurisdiction and certain statutory provisions involved are set out at page 2 of the petition for writ of certiorari and in the appendix to the petition.

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[1] Respondent on this Brief in Opposition was the plaintiff in the district court and the appellee in the court of appeals.

STATEMENT OF THE CASE

The dispute underlying the Public Law Board award at issue in this case began when the St. Louis Southwestern Railway Company ("SSW"), effective February 18, 1975, began using an outside contractor to transport "bad order wheels" from its spot repair track to its wheel shop in Pine Bluff, Arkansas. BRAC argued that such work was covered by the BRAC-SSW collective bargaining agreement and that the Railroad's unilateral subcontracting out of such work violated that agreement. BRAC filed a grievance with the Railroad on behalf of certain individuals requesting eight hours pay at the time and one-half rate until the subcontracting violation was corrected.

BRAC and the Railroad were unable to resolve their dispute and therefore submitted the dispute to a Public Law Board, which had been established by the parties in accordance with Section 3 Second of the Railway Labor Act, 45 U.S.C. § 153 Second, for the purpose of resolving contract disputes between BRAC and the Railroad. The Public Law Board which heard the dispute was comprised of three members, one member appointed by BRAC, one member appointed by the Railroad, and a neutral member appointed by the National Mediation Board.

BRAC and the Railroad filed lengthy submissions to the Public Law Board. BRAC argued that the work in dispute had been performed exclusively by its members for over fifty years until it was unilaterally subcontracted out by the Railroad in February, 1975. BRAC cited numerous awards of the National Railroad Adjustment Board ("NRAB") supporting the practice of awarding penalty pay for violations of the scope rule of the collective bargaining agreement and subcontracting out work to non-covered employees. The Railroad argued that the subcontracting out of work was within its "inherent management prerogative." The Railroad also objected to the remedy BRAC suggested and cited NRAB awards to support its claim that the damages sought were too "vague" and "indefinite" to be enforced.

The Public Law Board issued its award sustaining BRAC's claim on May 9, 1983. The Board held that it had been the historical custom and practice for over fifty years for such work to be performed by BRAC members. The neutral Board member reviewed the 67 NRAB awards relied upon by the parties in their submissions. In addition, the Board relied on a prior Board award, Award No. 211, which had considered a grievance based on a virtually identical claim. In that case, the Public Law Board award had awarded the union reparations at the time and one-half overtime rate in addition to any other compensation received for the period in question. The Board in the instant case fashioned its remedy relying on the numerous NRAB awards submitted by the parties. Although the Board rejected BRAC's request for reparations at the overtime rate of time and one-half, the Board ordered that the grievants be paid by SSW for eight hours per day, five days per week until such time as the parties stipulated that the Railroad had ceased subcontracting out the disputed work.

The Railroad sought an interpretation from the Board as to which provision of the collective bargaining agreement it had relied upon when it formulated its remedy. During the period of time that the Board was considering the carrier's request for an interpretation, the Railroad did not comply with the award or mitigate its potential liability by ceasing the subcontracting out of BRAC-covered work. Instead, the Railroad informed BRAC that it would not comply with the award until the matter had been adjudicated in the courts. BRAC filed a petition in district court to enforce the award on June 20, 1983. On July 5, 1983 the Railroad answered and cross-petitioned the court to set aside the award.

The Board issued its interpretation on September 6, 1983. In response to the carrier's inquiry as to what provisions of the collective bargaining agreement the Board had relied upon in fashioning its remedy, the Board stated that "it had relied upon the whole cloth of the collectively bargained agreement—the agreed-upon interpretations thereof—[and] the longstanding past practice of the parties." The Board further explained that it had found the carrier "to have willfully violated the parties' collectively bargained agreement." The Board observed that it was well-settled "in these circumstances [that] the covered employees are entitled to be compensated by reason of having been deprived of performing the covered work subject to this dispute."

Proceedings Below

The parties filed cross motions for summary judgment. The carrier contested the penalty pay aspect of the award arguing that penalty pay was an inappropriate remedy. BRAC moved to have the Board's award enforced. The district court granted BRAC's motion for summary judgment. The court relied primarily on settled Fifth Circuit precedent, *Brotherhood of R.R. Trainmen* v. *Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969). Ultimately, the case was appealed to the Fifth Circuit which affirmed the district court's judgment without opinion on June 4, 1987.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND DOES NOT RAISE ANY IMPORTANT ISSUE REQUIRING THIS COURT'S ATTENTION.

A. The Courts Below Applied the Proper Standard of Review in Enforcing the Public Law Board's Award.

Section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 152 First (p), provides that in an enforcement action in federal district court, the findings and order of the NRAB "shall be conclusive on the parties." The Railway Labor Act further provides that a court may not set aside an award unless: (1) the board failed to comply with the requirements of the Railway Labor Act; (2) the board failed to confine itself to the scope of its jurisdiction in interpreting the provisions of a collective bargaining agreement; or (3) a member of the board making the award was guilty of fraud or corruption. 45 U.S.C. § 153 First (p). The court's scope of review in a proceeding to enforce or set aside a National Railroad Adjustment Board ("NRAB") or Public Law Board award is extremely limited. *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89 (1978).

Public law boards are authorized by Section 3 Second of the Act, 45 U.S.C. § 153 Second, to serve as private alternative forums to the NRAB, and the court's "jurisdiction to review the arbitral awards of public law boards is equally restricted." *Brotherhood of Locomotive Engineers* v. *St. Louis S.W. Ry.*, 757 F.2d 656, 661 (5th Cir. 1985). Section 3 Second of the Railway Labor Act provides that "[c]ompliance with [public law board awards] shall be enforceable by proceedings in the United States District Courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the adjustment board." 45 U.S.C. § 153 Second.

This Court has repeatedly and forcefully stressed the limited judicial review of board awards available under the Railway Labor Act and has consistently overturned any attempt to broaden this narrow scope of review. In *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89 (1978), the court of appeals set aside an award holding that certain actions by the NRAB had deprived petitioners of due process. This Court reversed on the grounds that none of the petitioner's objections fell within the three limited categories of review set forth in Section 3 First (q) of the Railway Labor Act:

> Characterizing the issue presented as one of law . . . does not alter the availability or scope of judicial review; the dispositive question is whether the parties' objections to the adjustment board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act . . . . *We have time and again emphasized that this statutory language means just what it says.*

439 U.S. at 93 (emphasis added).

In *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U.S. 257 (1965), the Supreme Court reversed a lower court's refusal to enforce an NRAB award. This Court emphasized the principal of finality of board decisions and the Congressional intent to keep such disputes out of the courts:

> This Court time and again has emphasized and reemphasized that Congress intended minor grievances of Railroad workers to be decided finally by the Railroad adjustment board . . . . The legislative history of the Act . . . was designed for effective and final decision of grievances . . . and cannot realistically be squared with the contention that Congress did not propose to foreclose litigation in the courts over the grievances submitted to and disposed of by the board.

382 U.S. at 263 (citations and footnotes omitted).

This Court has noted that the scope of review involving enforcement of Public Law Board awards under the Railway Labor Act is "among the narrowest known to the law." *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 107 S. Ct. 1410, 1414 (1987); *Union Pacific* v. *Sheehan*, 439 U.S. at 91; *see also Diamond* v. *Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970). In the instant case, the courts below correctly applied the narrow standard of review and enforced the Public Law Board's award.

B. The Public Law Board Did Not Violate the Railway Labor Act, Did Not Exceed the Scope of Its Jurisdiction, and Was Not Guilty of Fraud or Corruption.

Applying the standard of review set forth by this Court's decisions to the Public Law Board award at issue in the instant case, it is evident that the petitioner's application for writ of certiorari should be denied. First, there is no evidence in the record that the Board failed to comply with the requirements of the Railway Labor Act or was guilty of fraud or corruption. Rather, the Railroad asserts that the Board exceeded the scope of its jurisdiction in framing its award to provide for eight hours of straight time pay, five days a week, from the date that the Railroad's contract violation commenced until the date it ceased such violation.

The Board's award, however, does not exceed the scope of its jurisdiction. It derives solely from an analysis of the collective bargaining agreement and interpretations of custom and practice in the industry submitted to the Board by the parties. As this Court previously observed, an award is considered to exceed the board's jurisdiction only if it is "wholely baseless and completely without reason." *Gunther* v. *San Diego & Arizona Ry. Co.*, 382 U.S. at 261. Similarly, in *BRT* v. *Central of Georgia Ry.*, the Fifth Circuit observed that a public law board

exceeds its jurisdiction only "if there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract." 415 F.2d at 412.

In the instant case, the Board found an unequivocal violation of the collective bargaining agreement. Indeed, in the Board's subsequent interpretation of the award, it found "the carrier to have willfully violated the parties' collectively bargained agreement." Moreover, the custom and practice in the railroad industry awarding penalty pay for such violations of the agreement goes back over thirty-five years. And it has been held that custom and practiee are "valid bases for fashioning remedies where the contract does not explicitly exclude them." *BRT* v. *Central of Georgia Ry.*, 415 F.2d at 416.

The Board in this case relied upon sixty-seven NRAB awards furnished by the parties in their submissions. A number of those decisions fashioned an identical remedy for similar violations of the collective bargaining agreement. In one recent award relied upon by both BRAC and the Public Law Board, Award No. 211, a public law board awarded penalty pay at the time-and-one-half rate against the identical railroad for a nearly identical subcontracting violation.

In a similar contracting out case in which the district court overturned a public law board's award because the grievant had been fully employed and had suffered no damages, the Fourth Circuit reversed, explaining that "if, whenever no direct layoff of a union member is involved, the employer can unilaterally contract out work that has been allocated by agreement to the union, under no greater threat than liability for merely nominal damages, the collective bargaining agreement would soon become a worthless scrap of paper." *Brotherhood of R.R. Signalmen of America* v. *Southern Ry. Co.*, 380 F.2d 59, 68 (4th Cir.), *cert. denied*, 389 U.S. 958 (1967).

In *BRT* v. *Central of Georgia Ry.*, the Fifth Circuit upheld an award of penalty pay or "double pay windfall." The court noted the "frequent practice of the board to calculate recovery without regard to the employee's interim mitigating damages." 415 F.2d at 415; *see also Sweeney* v. *Florida East Coast Ry. Co.*, 389 F.2d 113, 116 (5th Cir. 1968). The court observed that there were up to 3,000 board awards authorizing penalty pay, *id.* at 415 n.22, and held that where custom and practice supported the application of penalty pay, the Railway Labor Act "forecloses further judicial scrutiny of the principle." *Id.*

In the instant case, the Board stated that it relied upon the "whole cloth of the collectively bargained agreement—the agreed-upon interpretation thereof—[and] the long-standing past practice of the parties." Indeed, BRAC cited numerous awards in its submission to the Board which provide for penalty pay as a remedy for a carrier's violation of the scope rule. The Board acknowledged reading those prior awards in its opinion. There is, in fact, a thirty-five year history in the railroad industry, established in Third Division NRAB awards, establishing penalty pay as an appropriate remedy for scope rule or contracting-out violations.[2]

BRAC cited numerous NRAB awards in its submission to the Board which hold that it is of no significance in a scope rule violation whether the named grievants have suffered any injury. The awards provide that the penalty imposed is for the violation of the scope agreement itself. The individual recipients of such penalty are, the awards state, merely "incident thereto." In addition to the thirty-five years of custom and practice in the rail-

[2] The Third Division of the NRAB has jurisdiction over disputes involving clerical and other BRAC-covered employees. 45 U.S.C. § 153 First (h). A number of relevant NRAB awards were contained in the supplemental appendix filed with Appellee BRAC's Fifth Circuit brief.

road industry fashioning remedies identical to the one imposed in the instant award, the Board, in its interpretation, found the Railroad to have "willfully" violated the collective bargaining agreement.

It is well-settled that arbitrators have broad flexibility in fashioning remedies. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court stated as follows:

> When an arbitrator is commissioned to interpret and apply the collective bargaining, he has to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a variety of situations.

363 U.S. at 597.

Numerous lower courts have similarly held that arbitrators should have broad flexibility in fashioning remedies. *Local 369, Bakery & Confectionery Workers Int'l Union* v. *Cotton Baking Co.*, 514 F.2d 1235, 1237 (5th Cir. 1975); *United Elec. Workers* v. *Litton Microwave Cooking Products*, 728 F.2d 970, 972 (8th Cir. 1984) (*en banc*). In its *en banc* decision, the Eighth Circuit held that it was not for the court to determine whether the arbitrator's remedy was appropriate, whether it would have awarded "this particular relief," or whether the arbitrator correctly interpreted the contract. "Those questions are, in all but the clearest cases, the arbitrator's business, not ours." 728 F.2d at 972.

The Railroad's reliance on *Norfolk & Western Ry. Co.* v. *BRAC*, 657 F.2d 596 (4th Cir. 1981), is not persuasive in light of the Fifth Circuit's holding in *BRT* v. *Central of Georgia Ry.*, 415 F.2d 403. Relevant NRAB awards submitted by BRAC and relied upon by the Public Law Board in fashioning its remedy demonstrate an historic custom and practice in the railroad industry of awarding penalty pay for scope rule violations, whether described

as "punitive" damages, "penalty" pay, or "compensatory damages unmitigated by prior earnings."

The Railroad's reliance on *International Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), barring punitive damages against unions for breaches of their duty of fair representation, does not bear on this case. In *IBEW* v. *Foust*, this Court was concerned about punitive damages "compromising the collective interests of union members in protecting limited funds." 442 U.S. at 50. This Court also suggested that the threat of punitive damages would compel unions to "process frivolous claims [and] resist fair settlements." *Id.* at 52. The Supreme Court's rationale does not apply to employers, and certainly does not apply in the context of arbitral remedies. *See United Elec. Workers* v. *Litton*, 728 F.2d at 972; *Local 416, SMWIA* v. *Helgesteel Corp.*, 335 F. Supp. 812, 815-16 (W.D. Wisc. 1971), *rev'd on other grounds*, 507 F.2d 1053 (7th Cir. 1974) ("The question is not whether the award was 'punitive' but rather whether it was reasonable in light of the findings of the arbitration board").

The record in this case overwhelmingly supports the district court's judgment enforcing the Board's award and the Fifth Circuit's affirmance of that judgment. The remedy is rationally related to the Railroad's willful contract violation and liability ceased upon the Railroad's cessation of its violation. Thirty-five years of prior NRAB awards in the Third Division fashioning remedies virtually identical to the instant case for virtually identical violations provide ample precedent and a basis in custom and practice for the Board's award. The Board's finding of a willful violation provides further support for its remedy. Finally, the flexibility traditionally afforded arbitrators in fashioning remedies and the deterrent effect of the remedy imposed supports enforcement in this instance.

In short, the award was not "wholly baseless or completely without reason" and the Board did not, therefore, exceed the scope of its jurisdiction. Accordingly, the Railway Labor Act forecloses further judicial scrutiny.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 21, 1987